

Supreme Court, U.S.

FILED

APR 10 1991

No. 90-910

OFFICE OF THE CLERK

IN THE
SUPREME COURT

OF THE
UNITED STATES

OCTOBER TERM, 1990

Kirk L. Whitcombe,

Petitioner,

v.

WEYERHAEUSER CORPORATION, et al.,

Respondents,

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

PETITIONER'S REPLY BRIEF

KIRK L WHITCOMBE-PRO SE

43909 S.E. Tanner Rd. #5
North Bend, Wash. 98045
206 831-6756

TABLE OF CONTENTS

	<u>Page</u>
INTRODUCTION	1
ARGUEMENT.....	2
1. <u>Petitioners Primary Request Was for Prospect Relief, Not Damages.....</u>	2
2. <u>Respondents' Characterization of Respondents' Actions Through Various Levels of the State of Washington Court System in Depriving Petitioner His Right to a Jury Trial as The Performance of Discretionary Judicial Functions Have Been Seriously Placed in Question and Should Not Be Assumed as True and Correct.....</u>	3
3. <u>The State Court Judges and Judicial System as Necessary Parties in Supplying The Necessary State Action Nexus to * 1983 Actions Has Been Inappropriately Overlooked.</u>	6
4. <u>CONCLUSION</u>	10

TABLE OF AUTHORITIES

<u>Cases</u>	<u>Page</u>
<u>Dennis v. Sparks</u> , 449 U.S. 24.....	9
<u>Phillips v. J. Mashburn</u> , 746 F. 2d (1984)..	9
<u>Supreme Court of Virginia v. Consumers Union</u> ,	
446 U.S. 719 (1980).....	5

No. 90-910

IN THE
SUPREME COURT

OF THE
UNITED STATES

OCTOBER TERM, 1990

Kirk L. Whitcombe,

Petitioner,

v.

WEYERHAEUSER CORPORATION, et al.,

Respondents,

PETITIONER'S REPLY BRIEF

INTRODUCTION

Petitioner respectfully submits the following reply brief pursuant to Rule 15.6, Supreme Court Rules, in rebuttal to the false characterization of Petitioner's case, as set forth in the brief of Respondents in opposition to Petition for Writ of Certiorari.

ARGUEMENT

1. Petitioner's Primary Request Was for Prospect Relief, Not Damages. Petitioner's primary Prayer For Relief was for a federal judicial mandate or mandamus compelling the reestablishment of his "inviolate", state-established right to a jury trial.

The sole basis for denial of writ, presented in Respondent's brief in opposition, was on the grounds of judicial immunity and upon implied theory that the sole basis of Petitioner's action in the court below was for damages. Nothing could be further from the truth. In the Prayer For Relief, as contained within pages 12-14 of the Verified Complaint filed in the United States District Court, Western District of Washington, at Tacoma, damages were optional and subordinate to the principal request that Petitioner be



afforded his State of Washington established "inviolate" right to a jury trial, and that he not be deprived of such significant rights contrary to due process, as afforded every citizen of the United States.

Paragraph 2 of the Prayer For Relief, page 13 of said Verified Complaint, specifically requests the following relief: "For a mandate order to the Supreme Court of Washington directing Washington State Supreme Court to direct the Washington King County Superior Court to grant Plaintiff a new trial of his causes of action against the Defendant, Weyerhaeuser Corporation, this time to be heard by jury pursuant to Washington State Law;"

2. Respondents' Characterization of Respondents' Actions Through The Various Levels of the State of Washington Court System in Depriving Petitioner of His Right to a Jury Trial as The Performance of

Discretionary Judicial Functions Have Been
Seiously Placed in Question And Should Not
Be Assumed as True and Correct.

Petitioner, in his Petition For Writ of Certiorari has clearly established the bold unmitigated denial of his right to a jury trial by Respondents pursuant to an extremely thinly fabricated theory or pretext of waiver, without any semblance of factual or evidentiary basis or showing of intent to waive. It is submitted that in fabricating a judicial finding of waiver, virtually out of thin air and totally without evidentiary support, the State of Washington judges far exceeded the limits of judicial discretion as to result in the imposition of liability under 42 U.S.C. * 1983. Where there is total absence of conflicting testimony or other evidence through which a court would otherwise have to sift in arriving at a substantive or procedural

resolution, there is no context calling for the exercise of judicial discretion. What really was involved was capricious action in the guise of discretion and not properly protected under any modified doctrine of immunitiy.

The actions of the State of Washington court at its various levels in denying jury trial appeared to be performed more in the interests of administrative expedience or economy, rather than coming within any recognized domain of judicial discretion. Such administrative activity was far more analogous than anything else to the type of administrative or enforcement powers recognized in the case of Supreme Court of Virginia v. Consumers Union, 446 U.S. 719 (1980) as not falling within the normal penumbra of judicial immunity.

Thus, the State of Washington judges and



judicial system, in addition to clearly not being immune from the imposition of prospective relief, as clearly requested by Petitioner in his Complaint, are, by the same token, equally bereft of judicial immunity for damage and/or punitive action under * 1983 where their actions clearly do not involve the exercise of appropriate judicial discretion but naked abuse of administrative power in an attempt to save perhaps a few tax dollars at the litigator's expense and deprivation of supposedly "inviolate" rights.

3. The State Court Judges and Judicial System as Necessary Parties in Supplying The Necessary State Action Nexus to * 1983 Actions Has Been Inappropriately Overlooked.

In all of the commotion and attention revolving around the presence of judges and the state judicial system as parties



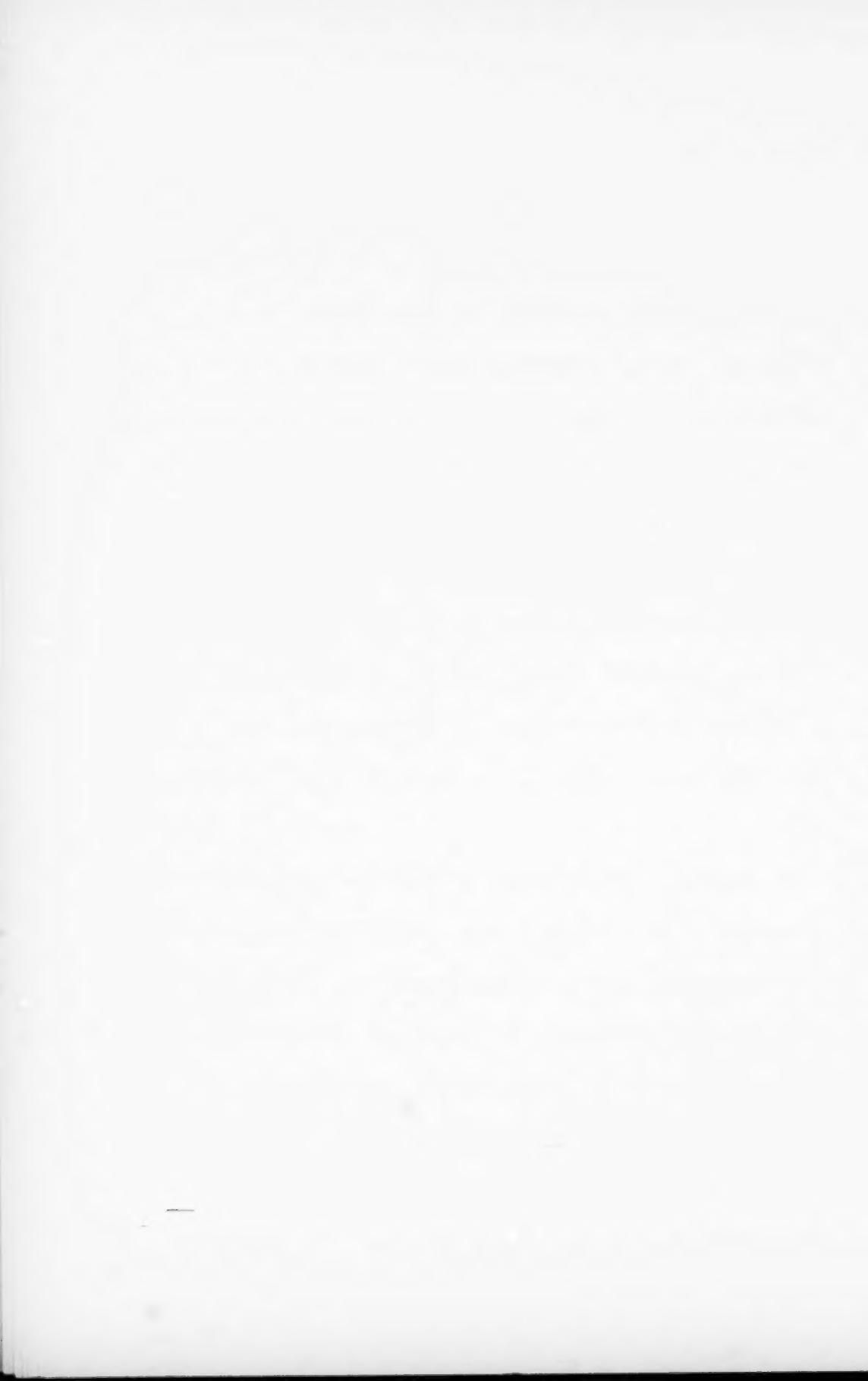
Defendant, Weyerhaeuser Corporation, the essential relationship between such parties and the private Defendant Weyerhaeuser Corporation, indeed the very presence of Weyerhaeuser Corporation as a party, has been almost totally ignored. Weyerhaeuser Corporation has not even been requested to respond to the Petition.

The Petitioner's purpose in commencing this litigation in District Court was not simply to collect as much damages as possible against any possible party Defendants, including the state court judges who heard his case. The whole thrust of the Petitioner's action was that he had been unfairly and unconstitutionally deprived of his right to a juryt trial, contrary to federal due process, and such deprivation was the result of a conspiracy between the Defendant, Weyerhaeuser Corporation, and other parties Defendant. As the record of

documents filed in the lower court proceedings will reveal, Defendant Weyerhaeuser Corporation, was not a mere passive bystander in connection with the constitutional abuse that was heaped upon the Petitioner. Indeed, Weyerhaeuser Corporation, through counsel, was actively arguing, pleading, and urging all of the way, through all stages of the proceedings, that the actions asserted against it not be heard by a jury, but solely by a trial judge, without jury. It was indeed Weyerhaeuser, through counsel, that advanced all of the arguments that eventually persuaded the State of Washington judges from the trial court level to the State of Washington Supreme Court to rule that Petitioner should not be afforded a jury trial. As Petitioner has repeatedly urged, such rulings were made in the absence of the slightest probative evidence that the Petitioner had voluntarily waived his jury trial rights and without

affording the Petitioner a proper due process forum, including reasonable notice and opportunity to be heard in the process of defending and seeking to implement such rights. Such combined and cooperative effort on the part of all of the Defendants, including Weyerhaeuser Corporation, if nothing else, established the essential nexus between private and state action as to warrant the granting of relief under 42 U.S.C. * 1983. Phillips v. J. Mashburn, 746 F.2d 782 (1984). Dennis v. Sparks, 449 U.S. 24, 101 S.Ct. 183, 66 L.Ed. 2d 185 (1980).

Again, Petitioner's action was not limited solely to one for entry of Judgement for damages, but, significantly, included a Prayer For Prospective Relief, including the entry of such mandate Order as by Writ of Mandamus directing the conducting of a new Trial, such as by the State of Washinbton Superior Court for King County, as deemed



appropriate and constituting a jury of Petitioner's peers as the triar of fact. No persuasive argument, reasoning, or statement of authority has been provided in opposition to the granting of such relief.

4. CONCLUSION

No doctorines of sovereign or judicial immunity have been cited warranting the total dismissal and rejection of Petitioner's action brought in the United States District Court for the Western District of Washington. Indeed, no proper claim of entitlement to immunity has been established warranting the dismissal of any of the Defendants or denial of the Petition. If Respondents' arguments of immunity are upheld and the Petition denied, the next question raised is that of who will be the next citizen of the State of Washington to be arbitrarily denied his or her supposedly



"inviolate" right to a jury trial given the particular procedural scenario created in the State of Washington for the administration of such rights and the strained judicial implementation and interpretation thereof as exemplified in Petitioner's case. The granting of the Petition would serve greatly to resolve such doubt and uncertainty and return the "in" to "inviolate" once and for all.

Respectfully submitted,



Kirk L. Whitcombe

Kirk L. Whitcombe, Pro Se